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IN THE

SUPREME COURT OF THE UNITED STATES

CEMENT MASONS HEALTH AND WELFARE TRUST FUND FOR NORTHERN CALIFORNIA and BOARD OF TRUSTEES OF CEMENT MASONS HEALTH AND WELFARE TRUST FUND FOR NORTHERN CALIFORNIA PLAN,

Petitioners,

v.

RAYMOND STONE,

Respondent.

ON PETITION OR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

This action was originally brought by the Cement Masons Health and Welfare Trust Fund for Northern California (hereinafter CMHWT), and the Board of Trustees of the Cement Masons Health and Welfare Trust Fund for Northern California, allegedly to attempt to recover funds advanced to pay the medical expenses of Kimberly Stone, a now deceased eligible dependent under the CHMWT Health Plan.

Appellant is seeking to invoke the terms of their reimbursement agreement and plan from the proceeds of two third party lawsuits filed by the children of the plan participant (Raymond Stone), as a result of the injury and subsequent death of their mother (Kimberly Stone). Raymond Stone was not a plaintiff in either of the underlying third party actions at the time of settlement. Matthew and Haven Stone were the only claimants, and were not named defendants in CMHWT's action that is the subject of this case.

Kimberly Stone was severely injured in an automobile versus pedestrian collision that occurred on December 19, 1995. Haven and Matthew Stone contemporaneously witnessed the the vehicle impact their mother.

Kimberly Stone was taken by ambulance to the University of California Davis Medical Center in Sacramento, California, (hereinafter UCD Medical Center) where she received extended medical care from December 19, 1995 through January 23, 1996. During that hospital admission, she started to regain consciousness and function after multiple surgeries. On January 16, 1996, a gastrostomy tube (stomach tube for feeding) was installed because of Ms. Stone's difficulty with swallowing.

Kimberly Stone was discharged from the UCD Medical Center and transferred to Chico Community Rehabilitation Hospital on January 23, 1996. She remained at Chico Community Rehabilitation Hospital from January 23, 1996 until her death on the morning of January 30, 1996.

On January 29, 1996, Kimberly Stone's gastrostomy tube became displaced, and was subsequently reinstalled by one of the nurses at Chico Community Rehabilitation Hospital. The nurse failed to properly reinstall Ms. Stone's gastrostomy tube, placing it outside of the stomach. Thereafter, feedings were administered to Ms. Stone, liberating feeding materials into her abdominal cavity which caused a severe, overwhelming infection from which she died on January 30, 1996, less than 24 hours after the failure to properly re-install the gastrostomy tube.

Haven and Matthew Stone, then ages 7 and 10, respectively, filed two lawsuits; the first for emotional injuries they sustained from seeing the automobile impact their mother, and the second as a result of the subsequent medical negligence causing their mother's death.

The first action, filed on December 18, 1996, was for negligent infliction of emotional distress pursuant to a bystander theory of liability based on the case of *Dillon v. Legg* (1968) 68 Cal.2d 728 and *Thing v. LaChusa* (1989) 48 Cal.3d 644.

CMHWT did not pay any benefits in connection with or arising out of the children's emotional distress injuries and damages. At the time the children sustained their emotional distress damages, no benefits had been paid for the care and treatment of decedent Kimberly Stone.

The owner/driver of the vehicle that struck Ms. Stone was without assets, but had a policy of automobile insurance covering the vehicle in the amount of $25,000 per person, $50,000 per incident. The only possible plaintiffs in the emotional distress lawsuit, Matthew and Haven Stone, settled their claims against the automobile owner and operator for the policy limits of $50,000. This settlement was consummated by an order approving minor's compromise that was signed by Sacramento Superior Court Judge Cheryl Chun Meegan, on January 14, 1998. Pursuant to court order, after attorney's fees and costs, the funds ($17,855.83 each) were placed in a blocked account, payable on their 18th birthdays.

The second action, filed in Sacramento County Superior Court on January 28, 1997, by Matthew and Haven Stone, and Raymond Stone, was a medical malpractice claim. The suit was based on the displacement and subsequent negligent replacement of Kimberly Stone's gastrostomy tube on January 29, 1996. The negligent replacement of the tube led to infection, respiratory arrest and death of Kimberly Stone on January 30, 1996. Prior to the malpractice, Kimberly Stone was stable and recovering.

There is no dispute that the law applicable to medical malpractice actions in the State of California limits wrongful death plaintiffs to a total recovery of $250,000 in general damages for loss of love, affection, society, comfort, and solace (Civil Code §3333.2(b)). Matthew and Haven Stone settled the medical malpractice case on March 3, 1999, for a payment of $194,999.99. The settlement was consummated by an order approving minor's compromise that was signed by Sacramento Superior Court Judge Roland Candee on April 27, 1999, and pursuant to Court order, these funds were used to purchase annuities for the minors which will pay benefits beginning on each child's 18th birthday.

The respondent in this case, Raymond Stone, is the father of Matthew and Haven Stone. Raymond Stone was only a plaintiff in the malpractice case. He was dismissed on January 22, 1998, because he had been separated from his wife for over one year prior to her death, did not intend to reconcile, and therefore suffered no loss.

Prior to his dismissal as a plaintiff, Raymond Stone was never a Guardian ad Litem for the children in either action because pursuant to Sacramento Superior Court Rules of Court, Chapter 10, Section 10, a potential party plaintiff is not allowed to be a Guardian ad Litem for minors in the same action. [1] After Raymond Stone dismissed his claims, he was appointed Guardian ad Litem.

CMHWT paid medical expenses from December 19, 1995 through January 30, 1996 for Kimberly Stone, totaling $572,325.80. These expenses included payments for her care at UCD Medical Center and at Chico Community Rehabilitation Hospital. Little or none of these medical expenses were paid as

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10.00 Application For Appointment of Guardian Ad Litem.

. . . When application is made for appointment of a guardian ad litem and the nominee for appointment is a plaintiff in the same action with the ward or in some manner was a participant in the transaction or occurrence giving rise to the alleged injury to the ward, the nominee will ordinarily not be appointed unless the application is accompanied by:

(A) A declaration under penalty of perjury setting forth facts establishing that no other parent, relative, or friend can or will accept the appointment of guardian ad litem for the minor in the action; and

(B) A declaration under penalty of perjury by the attorney for the nominee stating that the attorney, having investigated the circumstances, has represented to the nominee and represents to the court that there is no conflict of interest between the nominee and the minor if the nominee is appointed the guardian ad litem.. . . (Emphasis added.) (Sacramento Superior Court Local Rules, Chapter 10.)

a consequence of the January 29, 1996 medical negligence. The only charges that could have been paid by CMHWT from the act of malpractice were those incurred on January 30, 1996, relating to the resuscitation efforts; emergency transfer to Chico Community Hospital; and emergency department charges to diagnose her fatal condition, all of which occurred for approximately 8 hours.

CMHWT filed suit against its insured, Raymond Stone, only (not Haven and/or Matthew) on February 13, 1997. Mr. Stone answered the complaint on June 10, 1997.

On April 15, 1998[2], defendant, now Appellee/Respondent (Raymond Stone), filed a Motion for Summary Judgment, based on lack of jurisdiction, and the fact that equity and the express terms of the plan did not allow for recovery in this case. This matter was heard on May 29, 1998, the Honorable Judge Frank C. Damrell, Jr. presiding. The judge granted the summary judgment, and ordered CMHWT's claim dismissed.

The trial court's Memorandum and Order, filed on June 2, 1998, stated: "Stone argues that plaintiffs' suit seeks reimbursement, not restitution within the meaning of §1132(a)(3), and that the court lacks subject matter jurisdiction over plaintiff's claim for reimbursement. The court agrees. Stone's motion for summary judgment is granted." (Memorandum and Order, p. 2, 11. 5-7.)

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A typographical error exists in 9th Circuit Respondent's brief indicating April 15, 1997.

The basis for the trial court's ruling was the decision of the Ninth Circuit in *FMC Medical Plan v. Owens,* 122 F.3d 1258, 1261 (9th Cir. 1997), holding that *Mertens v. Hewitt Assoc.,* 508 U.S., 248, 113 S.Ct. 2063 (1993), precluded any action under §1132(a)(3) of ERISA for "monetary relief". (Memorandum and Order p. 2.)

The U.S. Court of Appeals for the Ninth Circuit affirmed, in part, finding that *FMC Medical Plan, supra,* is "legally indistinguishable" from the present case and compels dismissal. Cement Masons Health and Welfare Trust Fund v. Stone, 197 F.3d 1003, at p. 1006 (1999).

The panel reversed the trial court on one point regarding the dismissal of the action for lack of jurisdiction. The panel held that jurisdiction did in fact exist, but that ERISA provided no remedy and that the dismissal should have been on the merits. The case was remanded to the U.S. District Court with instructions to dismiss the case on the merits (Id. at p.1007-08).

The circuit panel found that no claim of restitution would lie against Raymond Stone, stating at page 1007:

> "Appellants also make two arguments why *Mertens* and *Owens* do not control this case. Appellants first contend that they seek 'restitution' which they characterize as an equitable remedy. However, restitution, as used in §1132(a)(3) means 'ill-gotten gains'. *Mertens*, 508 U.S. at 260, and we have construed ill-gotten gains to mean money obtained through 'fraud or wrongdoing', *Owens*, 122 F.3d at 1261. It is undisputed in this case that payment of Mrs. Stone's medical bills by

appellants was not obtained through fraud or wrongdoing. Cement Masons was required under the terms of the Plan to make those payments, and Cement Masons is not challenging their correctness. Rather, appellants contend that Mr. Stone is obliged to reimburse Cement Masons for those payments out of money obtained from third parties, and to pursue claims that might result in obtaining additional money from third parties in the future. Even if Mr. Stone has some obligation to pursue such claims and to reimburse Cement Masons (a question we do not decide), that obligation does not make money previously paid by Cement Masons 'ill-gotten gains' subject to restitution within the meaning of §1132(a)(3)."

Further, the Court stated at page 1008:

"Two of the three remedies appellants seek depend on the propriety of enforcing the lien. Enforcement of the lien, however, is nothing more than a mechanism to enforce or to obtain the equivalent of a damage remedy. Further, on the facts of this case, the only existing fund is the $50,000 received by the two minor children, who have not been made defendants and, in any event, have no obligation whatsoever under the Plan appellants are seeking to enforce. The third remedy appellants seek is an injunction that would require Mr. Stone to keep them informed of claims against third parties. However, it is undisputed that Mr. Stone has not recovered on third-party claims and is not asserting any new third-party claims."

The above heart of the decision of the 9th Circuit panel was totally misrepresented by appellants' brief at page 9, wherein appellants construed the underlying decision as follows:

> "In affirming the trial court, the circuit panel rejected the argument that a clam of restitution would lie against Raymond Stone; the panel held that an action in restitution is only appropriate where the claimant is seeking to recapture 'ill-gotten gains'. 197 F.3d at 1006-07, citing *Owens* 122 F.3d at 1261. The panel stated that "we have construed ill-gotten gains to mean money obtained through 'fraud or wrongdoing ..."' and found that Stone's refusal to honor his reimbursement agreement and plan reimbursement requirements did not cause his 'gain' of over half a million dollars to be 'ill-gotten.' 197 F.3d at 1007."

The implication made by appellants is that the 9th Circuit cited *Owens, supra*, in describing "ill-gotten gains", when in fact the Court was citing *Mertens, supra*. Further, the appellants imply that the 9th Circuit felt that Mr. Stone received a gain of over a half a million dollars, which was not found to be ill-gotten. As can be seen from the 9th Circuit opinion, this is a misrepresentation of the findings of the Court.

Further, appellants state at pp. 9 and 10:

> "Finally, the panel ruled that the only fund at issue was $50,000 recovered by the Stones' two minor children who 'have no obligation whatsoever under the plan appellants are seeking to enforce." [4] 197 F.3d at 1007.

The above fails to point out, as was noted in the 9th Circuit's decision, that appellants did not seek to sue the two minor children, but sued only Mr. Stone who received none of the funds derived from either lawsuit.

Appellants allege in their application for Writ, page 10, that:

> "The panel in Stone acknowledged the fiduciaries' contention that 'Mr. Stone attempted to circumvent his obligation by allowing his children to exhaust the [insurance] policy limits with their claims ... [and] Mr. Stone dismissed his own claims in [a] second lawsuit to prevent the fund from sharing in any recovery resulting from the wrongful death claim.' [5] 197 F.3d at 1005. But the panel failed to discuss the implications of these undisputed points in the record."

Appellants misstate the opinion of the panel, which actually said, at 197 F.3d 1005:

> "**According to appellants** Mr. Stone attempted to circumvent his obligations by allowing his children to exhaust the driver's policy limits with their claim for negligent infliction of emotional distress. **Appellants contended further** that Mr. Stone dismissed his own claims in the second lawsuit to prevent the fund from sharing in any recovery resulting from the wrongful death claim." [Emphasis added.]

This is a far cry from the statement of appellants that the panel acknowledged their contention.

SUMMARY OF ARGUMENT

Defendant and Respondent/Appellee Raymond Stone contends the case of *FMC Medical Plan v. Owens* (9th Cir., 1997) 122 F.3d 1258 establishes that CMHWT's lawsuit is meritless and should be dismissed. CMHWT is seeking straight contractual monetary recovery for medical expenses they had to legitimately pay under its health plan. This is not equitable relief, and therefore is prohibited under the provisions of ERISA.

It appears that CMHWT believes that all types of causes of action are available for monetary damage under the construction that common law doctrines may be adopted pursuant to ERISA. This is contrary to the express terms of ERISA and would open the door for unlimited litigation not only by ERISA plan fiduciaries, but by participants and beneficiaries under the plan. Thus, by this construction, any cause of action resulting in monetary damages that could be construed to be related to, or involved with, an equitable right could result in damage verdicts never anticipated by the legislative mandates of ERISA statutes.

CMHWT is also not entitled to reimbursement based on the express language of the plan. The plan only allows CMHWT to seek reimbursement for medical expenses paid arising from a third party's negligence. In this case, CMHWT did not pay any medical expenses relating to the children's emotional distress claims. These injuries and damages to the children accrued at the time of impact in the auto accident. This was before CMHWT paid any medical expenses.

Further, the only medical expenses paid by CMHWT that relate to medical negligence, if any, were those paid after the act of malpractice on January 30, 1996. These expenses, if paid, would have related to the efforts undertaken to resuscitate; emergently transfer her to the emergency department of Chico Community Hospital; and evaluate her condition to render a diagnosis. (It is believed no such charges were ever made because of the hospital's negligence.) CMHWT did not pay any medical expenses or benefits in connection with or arising out of any injury, illness, disease or other condition caused by third party wrongdoer (medical malpractice), other than those possibly incurred over a few hours on January 30, 1996.

REASONS THE PETITION SHOULD NOT BE GRANTED

A. The Facts Of This Case Are Particularly Unique And Will Never Again Be Seen In A Case Involving ERISA Issues.

There were two distinct lawsuits based on two distinct negligent acts. Neither of the two lawsuits trigger repayment of benefits under the express terms of the health plain.

Appellants further contend that Mr. Stone attempted to circumvent his obligation to Cement Masons by allowing his children to exhaust insurance policy limits, and contend that the 9th Circuit panel acknowledged such a contention in their opinion. (Appellant's Application for Writ of Certiorari, p. 10.) Further, in footnote 5 on page 10, appellants state: "In fact, it appears that Mr. Stone arranged for a third party to serve as Guardian ad Litem for the children, precisely to avoid the terms of the plan, and the reimbursement agreement."

These are false allegations. The Superior Court in and for the County of Sacramento, State of California, Local Rule, Chapter 10, Section 10, establishes that a potential party to an action should not be appointed as Guardian ad Litem, since a potential conflict of interest exists. Mary Kay Carlton was named as the independent person to be the Guardian ad Litem, in order to comply with the local court rules. The panel did not acknowledge that Mr. Stone attempted to circumvent his obligation. The facts are that the Court stated on page 1005 as follows:

> "According to appellants, Mr. Stone attempted to circumvent his obligation by allowing his children to exhaust the driver's policy limits with their claims for negligent infliction of emotional distress. Appellants contend, further, that Mr. Stone dismissed his own claims in the second lawsuit to prevent the fund from sharing in any recovery resulting from the wrongful claim." [Emphasis added.]

It is noteworthy that appellants are misrepresenting their contentions as the findings of the 9th Circuit Court of Appeai. This is obviously false and contrary to the language of the opinion (Id. at p. 1005).

Thus, there was no wrongful conduct engaged in by Mr. Stone. It should be further pointed out, as was stated in the Respondent's brief before the 9th Circuit, at page 8, Mr. Stone had been separated from his wife for in excess of a year prior to the accident in question, and it was therefore deemed inappropriate to sue for a loss that could not be proven because there was no true marital relationship in existence. Further, Mr. Stone was not present at the time the injury occurred to his wife on December 19, 1995, or January 29, 1996, and therefore

could state no cause of action for emotional distress under California law.

All of the above issues are unique and will not be seen in other ERISA cases. Therefore, the petitioners writ should be rejected.

B. The Facts And Circumstances Of This Case Would Require The United States Supreme Court To Interpret The Effect Of California Civil Code §3333.2 Limiting Damages To $250,000 In Medical Malpractice Cases And Decide Issues of Intra-Family Allocation.

The maximum damages that can be recovered for general damages in medical negligence cases are limited by statute in the State of California (Civil Code §3333.2(b)). The ability to recover damages on behalf of the minor plaintiffs are thereby reduced in that said minor plaintiffs did not have the opportunity to be fully compensated for the loss of their mother because it arose from a negligent act of a healthcare provider. This would impact the ability of any ERISA plan to recover advanced expenses. Since the minors cannot collect the true value of their loss, the equity of allowing an ERISA plan to collect 100% of their payments, even if it exceeds the amount recoverable under California law, should be considered.

Further, under the facts of this case, no damages could be sought for the expenditures made by CMHWT. The medical expenses were not incurred as a result of the negligent conduct of the hospital since they were incurred prior to the time of the negligent act which resulted in the death of Kimberly Stone. Therefore, the only recovery available to the minor children was for their loss of comfort and society due to the death of their

mother as opposed to the medical expenses that were incurred in her care and treatment. In this case, the wrongful act of the hospital did not cause the expenditure of $572,325.80, and the minor children could not recover those expenses in their wrongful death action.

Further, the damages sustained by the minor children as a result of negligent infliction of emotional distress theories involved no payment of medical expenses. The appellants contend that the father should have sued the driver of the vehicle that struck his wife for her wrongful death. However, since the policy of insurance available under said cause of action was only a $25/50,000, this would have generated only one $25,000 payment to be spilt among the minors and Mr. Stone. Appellants contend that an election should have been made between the welfare of Mr. Stone's children (in suing for independent causes of action they possessed for watching their mother be struck by a car), and Mr. Stone suing the driver for her medical expenses, which could only have been sued for by decedent (which obviously could not be done because she was deceased).

These equitable defenses would all be available in any action for "other appropriate equitable relief "pursuant to 29 USC §1132(a)(3). Therefore, this case presents truly unique and different facts than any other case that could be brought before the Supreme Court involving these issues, and is not appropriate for review.

C. There Was No Unjust Enrichment.

As a result of the lawsuit filed herein, a total of $244,999.99 was recovered for the minor children from all sources. Said funds were placed in blocked, interest bearing trust accounts, and used to purchase annuities for the benefit of

the minor children. Appellants contend that unjust enrichment would exist if the $572,325.80 was not paid to CMHWT. It is obvious that the amount of damages that would normally have been recoverable in a case such as this are not available based on a limitation of damages discussed supra, under California Civil Code §3333.2, limiting general damages to $250,000. Can it be said that the total sum of $244,999.99 fully compensates two young children for the loss of their mother? Unjust enrichment means a double recovery. There was no recovery whatsoever for the medical expenses that were paid herein. Therefore, there was no unjust enrichment when there has been no double recovery.

D. The Opinion In This Case Does Not Leave The Petitioners Without Remedies To Enforce Written Agreements With Their Participants.

The unique facts of this case will never be seen again. This case, decided on its own facts, has many equitable defenses that would have been applied in the underlying action, had the action not been dismissed. It would amount to a useless act to overturn the opinion of the 9th Circuit and remand this case to the district court for hearing on the facts that would allow this case to be defended on equitable grounds and plan participation wherein no recovery would be obtained by CMHWT.

RESPONSE TO AMICUS BRIEF FILED BY CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND

All of the above arguments regarding the uniqueness and equitable defenses that apply in this case also apply to the Amicus brief filed by Central States, Southeast and Southwest

Areas Health and Welfare Fund (CSSSAHWF). The argument made by CSSSAHWF also alleges that prohibiting the health plan from collecting paid medical benefits to their participants would be the death knell for their benefit program. However, a closer inspection of the argument reveals the fallacy of their contention.

On page 2, CSSSAHWF claims that they have 300,000 beneficiaries. They further indicate that their welfare fund has been in existence since 1984, and the fund's subrogation program has achieved recoveries and savings totaling approximately $62 Million. They go on to state that if the subrogation recoveries are reduced, the benefits provided to beneficiaries will be correspondingly reduced.

If one divides $62 Million (recovered and saved) by 16 years (the length of the plan's existence), and then divides the yearly amount of $3,875,000 by 300,000 (participants), the reduced benefits would be $12.92 per year per participant, or $1.08 per month reduction. Obviously, this is not a significant reduction and shows the lack of merit in the health plan's argument. Further, no discussion is set forth in the Amicus brief as to how many cases are not pursued as a result of the plan's claim for reimbursement, as opposed to claims that would be pursued in the absence of reimbursement. This clearly effects the numbers stated, and the welfare of those persons who could have brought a lawsuit and did not.

CONCLUSION

For the reasons set forth herein, based on the unique circumstances set forth in the underlying action, and its relationship to the laws of the State of California, this case should not be accepted for Writ of Certiorari on the basis that it would not be a definitive ruling with regard to other potentially litigatible cases.

Respectfully submitted,

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